IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK L. CHRISTENSEN,
Appellant,

vs.

CHARLES LEE TROTTER and
JOHN S. RAYBURN,
Appellees.

No. 11,964

APPELLANT'S REPLY BRIEF

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Appellant deems it unnecessary, in replying to appellee's brief, to discuss again the authorities cited in Appellant's Opening Brief, inasmuch as they are not challenged by Appellee. Appellant, however, earnestly insists the appellee has completely misinterpreted the evidence as shown in the record.

Henwood v. Neal, 198 S. W. (2d) 125 (Court of Civil appeals of Texas) cited by appellee is, of course, a correct statement of the law regarding the sufficiency of the evidence when an appeal is bottomed on the sufficiency of the evidence to support a verdict. However, the appellant does not raise the question of the **sufficiency** of the evidence, but does earnestly insist that there is **no** evidence to support the verdict.

APPELLEE'S "STATEMENT OF FACTS"

Appellees statement of facts assumes as proved those facts which are necessary to the proof. Thus appellee states:

> "Before going into Peggy's Cafe, Wilson parked the truck and trailer in a jackknifed position at the southwest corner of the Cafe, headed west (see diagram, T. R. p. 28, and p. 72), and on the highway right of way."
>
> Appellee's Brief, page 4.

Such calm assumption of unproven facts is not justified. In the same paragraph appellee notes:

> "Tire marks from the point where the truck was on the railroad rails extended in a general northeasterly direction toward Peggy's Cafe."
>
> Appellee's Brief, page 4.

We submit that the tire marks also extended in the general direction of Montana, Canada, and possibly Russia. The basic fallacy of the appellee's case is demonstrated by the last quoted argument that certain tire marks extended in a general northeasterly direction. Peggy's Cafe was in a general northeasterly direction. Ergo, the tracks lead to Peggy's Cafe!

Based upon this conclusion, appellee argues that despite the undisputed positive evidence to the contrary, the jury was entitled to believe that the truck was parked at Peggy's Cafe. Following the same illogical sequence, and having reached this conclusion, appellee states that the truck was parked at Peggy's Cafe **off the highway.** Then, if the truck, having been placed by tire marks extending in a general northeasterly direction at Peggy's Cafe, off the highway, was found later on the railroad tracks, appellee argues that the Court may again conclude that negligence of the truck driver was the cause of the truck being on the railroad right of way. The whole of appellee's case is based on the glittering premises to be drawn from the fact appellant's truck was in fact on the railroad right of way.

APPELLEE'S ARGUMENT

Appellee again incorrectly assumes facts in argument concerning the complaints filed against the Atchison, Topeka and Santa Fe Railway Company. It is not true that the complaints only charged contributory negligence on the part of the Atchison, Topeka and Santa Fe Railway Company. The complaints charge that the sole cause of the accident complained of was the negligence of the Atchison, Topeka and Santa Fe Railway Company.

We do not quarrel with appellee's statement of the law as set forth in American Jurisprudence. The statement of the law is in no sense justified by the fact situation herein.

It may be possible that attorneys familiar with negligence cases find extended conferences with clients a bother prior to filing suit. Such, apparently, is the case here. Yet, the complainants gave their attorneys "all they had." Based on this information, the attorneys filed complaints against the Atchison, Topeka and Santa Fe Railway Company, and verified them. We believe that the complaints are pleadings "which can fairly be regarded as statements by the party," and should have been admitted as such.

RES IPSA LOQUITUR

Appellee's argument concerning res ipsa loquitur is based upon incorrect statements of the facts. Appellee states:

> "The plaintiff's" witness, Dewey A. Pennington. saw the truck parked at the west corner of Peggy's Cafe and headed west."
>
> Appellee's Brief, page 8

Dewey A. Pennington did not so testify.

Sam Marbell's testimony was based upon the admitted fact that he did not believe the truck drivers' testimony, because if the drivers testified correctly the truck could not have gotten away without outside interference. All of Marbell's testimony, as pointed out in Appellant's Opening Brief, is a conclusion based on a conclusion.

Under appellee's theory of the case it is impossible and would be impossible to prove as an affirmative proposition that the getting away of an unattended automobile was not negligence. The truck was not under the control and not under the exclusive possession of the appellant as is clearly shown by the evidence.

Appellant does not "overlook the fact that there was a conflict in the evidence as to the point where the truck was parked." There is no conflict in the evidence as to the point where the truck was parked. There is no conflict in the evidence, and there is no evidence in the record, from which the jury was entitled to assume that the truck was parked any place other than that testified to by the two disinterested eye-witnesses.

Appellee states that the cases relied upon by the appellant present situations where the uncontracdicted evidence showed no liability. Inasmuch as the distinctions are not pointed out, appellant will not argue the appellee's charge, but must admit the truth of the accusation: appellant **does** rely upon cases where the uncontradicted evidence shows no liability.

THE INSTRUCTIONS

The judge's instruction predicates itself on the fact that an instrumentality "was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion." It has been appellant's contention throughout the trial of this cause, and it is now appellant's contention, that the uncontradicted evidence proves that the instrumentality of this case was not in the possession of and was not under the exclusive control of the defendant at the time the cause of injury was set in motion. The testimony of Sam Marbell as quoted in appellant's opening Brief conclusively demonstrates according to the appellee's own theory of the case that the instrumentality was set in motion by an intervening agency. Under the circumstances the giving of the instruction was erroneous.

PARKING ON THE HIGHWAY

It is impossible to reply to appellee's argument on the proposition that the truck was parked on the highway. It must be apparent that even if the appellee is permitted to

base an inference upon an inference upon an inference, the truck cannot be placed upon the highway as defined by the Arizona Code. Highway, as understood by the Code, is a place open to the use of the public as a matter of right for the purpose of vehicular traffic. The parking lot at Peggy's Cafe and the canopy of the service state are not places open to the public for the use of vehicular traffic. The instruction assumes that they were and so charged the jury.

Inasmuch as appellee does not argue the error of the giving of the instruction, appellant will not further argue the point.

CONCLUSION

Upon the errors pointed out in the appellant's Opening Brief, and upon the record, appellant earnestly insists that the Court must reverse the lower court and remand with instructions to dismiss.

Respectfully submitted,
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STRUCKMEYER.

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